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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1726

ALBERT M. LEFKOWITZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Opinions Below.

The opinion of the Court of Appeals is not reported. A copy of the opinion is attached in our Appendix (App. A). On March 31, 1980, the court denied petitioner's Petition for Rehearing.

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the material omission by the Internal Revenue Service Special Agent, in his affidavit for a search warrant—failing to disclose the identity of a confidential informant as petitioner's estranged wife, especially where the wife/informant was told that she would not be prosecuted

in the pending investigation of the joint tax returns filed by petitioner and the wife/informant, for which the search warrant was sought—invalidates the search warrant issued herein?

Summary of Argument.

The Internal Revenue Service Special Agent failed to disclose in his affidavit for the search warrant that the confidential informant whose information was the main foundation for the affidavit, was petitioner's wife, and that she had been told that she would not be prosecuted with respect to the pending investigation into the joint tax returns filed by petitioner and the wife/informant.

This failure to disclose her identity as petitioner's wife deprived the magistrate of the opportunity to perform his constitutionally mandated function—to determine probable cause. The material information, her identity as petitioner's wife, thus omitted, the affidavit and the ensuing procedure were tainted. This taint, irrespective of the motivation of the affiant, renders the search warrant fatally defective.

Finally, any attempt to retrospectively calculate the result the magistrate *might* have reached had he been properly informed, seriously denigrates Fourth Amendment rights.

Statement of Facts.

On August 10, 1978, petitioner LEFKOWITZ was charged in six counts of a seven count indictment filed in the Unites States District Court for the Central District of California (R.1-13).[1] Petitioner was charged with various income tax-related offenses.[2]

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[1] "R." is a reference to the Clerk's Record; "R.T." refers to the Reporter's Transcript of the hearings held in the trial court. The date of each hearing will follow the reference for further identification.

[2] Count One charged petitioner and Edward Babic with conspiracy to defraud the Internal Revenue Service.
Count Two charged petitioner with submitting false statements to the Internal Revenue Service.
Count Four charged petitioner with making a false income tax return for the calendar year 1971.
Count Five charged petitioner with failure to file an income tax return for 1972.

The matter was assigned to the Honorable Robert M. Takasugi who conducted hearings on petitioner's motion to suppress evidence on September 29, 1978 and October 20, 1978.

The matter was tried before Judge Takasugi on stipulated facts on December 5, 1978, following the judge's oral denial of the motion to suppress.

On March 26, 1979, petitioner was sentenced to four years imprisonment on Counts 1, 2, 6, and 7 to run concurrently. On Counts 4 and 5, petitioner was placed on probation for three years, these sentences to run concurrently with each other, but consecutive to the period of incarceration (R.15).

The search warrant, issued in November, 1975, to search petitioner's office and home, was obtained by the affiant, Internal Revenue Service Special Agent Martin G. Laffer (R.51-57). In the affidavit, Special Agent Laffer relied upon petitioner's wife as a confidential informant. The magistrate was not informed that the wife was the confidential informant.

In the affidavit, Agent Laffer stated that on June 12, 1975 he served an Internal Revenue Service administrative summons on petitioner and one Martin Fisher, who were president and controller respectively of various named corporations. On the date on which the summons was returnable, petitioner, Fisher and their attorney, Edward W. Babic, appeared and Babic explained that many of the records did not exist, had been destroyed or could not be located (R.51). Thereafter, pursuant to arrangements, Fisher and Babic presented Laffer with certain journals, minute books and other documents requested in the summons (R.51).

During further conversations with Babic and Fisher, from July 14, 1975 to November 11, 1975, Laffer was informed

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Count Six charged petitioner with evading income tax for 1973.
Count Seven charged petitioner with evading income tax for 1974.

that certain other journals were still being sought and attempts to locate the records were unsuccessful (R.52).

The affidavit then detailed information derived from a confidential informant reflecting that certain of the records had been hidden in petitioner's home and indeed, that certain records had been prepared and backdated after the service of the summons.

During the course of the proceedings on the motion to suppress, the court revealed the identity of the confidential informant as petitioner's wife, Helen Lefkowitz. Petitioner urged that as a consequence, the search was invalid on two theories—(1) that under the circumstances the failure to inform the magistrate of the informant's identity deprived the magistrate of the opportunity to exercise properly informed discretion, rendering the magistrate's act constitutionally defective, and (2) that the use of a wife as a confidential informant sufficiently invaded marital privacy to render the search "unreasonable" under the Fourth Amendment.

At the initial oral argument on the motion to suppress conducted on September 29, 1978, the court recognized that "[w]e have some provocative issues in this particular case" (R.T.5). The court recognized at the outset the problems with crediting this informant's tip (R.T.7-8):

> Mrs. Lefkowitz provided information to the special agent, Mr. Laffer, the affiant, regarding the transfer of the summoned records or documents from the business premises to the apartment occupied by a Patricia Sullivan. I think the affiant concedes, at least in my reading of the affidavit, that Mrs. Lefkowitz is certainly not a tested reliable informant.
>
> For that reason, there are provisions that the Court has examined in reference to an attempt toward corroborating the untested informant. I certainly was not

impressed by the corroboration. I think the corroboration naturally has to go, and I think that was brought out by one of the papers.

Corroboration naturally has to go to the facts from which we establish probable cause. The questions regarding where she maintained the bank account and whether Mr. Laffer verified that and so forth, I don't find that to be the type of corroboration the cases are talking about.

The court then detailed the basis for its opinion as then held (R.T.8-10):

The reasoning of the Court is as follows:

I think the issue and the only issue in this particular case is to determine whether there was probable cause to believe that the records were at Defendant Lefkowitz's residence. I am talking about the search of, naturally, the residence. To establish this, the facts relating to the transfer of the records from the business to the so-called Sullivan apartment is immaterial. What is material is the removal of those records from the Sullivan residence to Defendant Lefkowitz's residence, and the person having knowledge of this particular transfer, the transfer from the Sullivan residence to the Lefkowitz residence, is Mr. Nestico.

Your attention is called to, I believe it was, paragraph 11 of the affidavit re search warrant, where the affiant was informed by Mr. Nestico that the latter was instructed by Defendant Lefkowitz to remove the carton boxes containing the business records from the Sullivan apartment or former Sullivan apartment to Mr. Lefkowitz's residence in Granada Hills. Mr. Nestico was further told by Defendant Lefkowitz that the boxes were important and not to tell anyone about them. Mr.

Nestico further informed the affiant that he observed those records at the Lefkowitz residence at the end of October.

However, Mr. Nestico himself is an untested informant, and therefore some corroboration is required. The Court believes that this corroboration is found in the information provided to Mr. Laffer by the apartment manager. I think that is found in about paragraph 10 of the affidavit. The apartment manager had stated that she saw Mr. Nestico removing six to eight cardboard boxes from the former Sullivan apartment in his vehicle and that this occurred in October 1975.

The Court's analysis might come as a surprise even to the Government in the sense that *it would appear that Mr. Laffer was relying quite heavily upon Mrs. Lefkowitz as the particular person to carry the affidavit re search warrant*, but after a very, very careful reading of it, I feel that it is Mr. Nestico who is the person providing the pertinent information and the apartment manager as the person corroborating that information in order to establish the appropriate probable cause for the search warrant which was issued by the Magistrate. (Emphasis Supplied).

At the conclusion of the argument, at the request of petitioner's counsel, the court, while disagreeing with counsel's view of the law, nevertheless indicated that it "would be more than happy to receive a motion for reconsideration" (R.T.11-12).

Thereafter, petitioner filed a supplemental motion and memorandum (R.229-240). Petitioner urged that the court had properly disregarded the information provided by the confidential informant, but had relied upon non-probative information to corroborate Marc Nestico. Petitioner demonstrated that the apartment manager's statement that she

had seen Mr. Nestico move six to eight cardboard boxes from the apartment in October, 1975 was not corroboration for Nestico's information that petitioner had directed him to move boxes in *September*, 1975, particularly where the affidavit also stated that Nestico moved from the apartment in *October*, 1975.

ARGUMENT.

A. The Court of Appeals Erred in Concluding That the Omission in Failing to Disclose the Identity of Petitioner's Wife as a Confidential Informant Did Not Invalidate the Warrant Under Fourth Amendment Guidelines.

For Fourth Amendment purposes, the crux of the issue involved here is not simply whether there was probable cause to believe a crime has been committed, but more specifically, whether there is probable cause to believe that the places to be searched contained evidence of a crime. Thus, as recently phrased in *Zurcher v. Stanford Daily*, ... U.S ....., 98 S.Ct. 1970 (1978):, *reh. denied* .... U.S ....., 99 Set 231 (1979):

> "[O]nce it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime." Citing *United States v. Manufacturers Nat. Bank of Detroit*, 536 F.2d 699, 703 (6th Cir. 1976).

This Court stated in *Zurcher* (at 99 S.Ct. 1975) that "under existing law, valid warrants may be issued to search . . . property, at which there is probable cause to believe the fruits, instrumentalities or evidence of a crime will be found." See also Rule 41, Federal Rules of Criminal Procedure which reads in pertinent part:

> (b) Property Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed for use or which

> is or has been used as the means of committing a criminal offense."

The district court's conclusion at the initial hearing that "the only issue in this particular case is to determine whether there was probable cause to believe that the records were at Defendant Lefkowitz's residence" (R.T.8) thus incorrectly ignored the seminal issue—whether there existed probable cause to believe that a federal crime had been committed. As will be argued *infra*, after considering the nature of the confidential informant, the informant's information must be disregarded. Without the crediting of the informant's statements, the affidavit is lacking in sufficient evidence to lead a reasonable person to the conclusion that a federal crime has been committed. This step *must* precede a search for evidence of that crime. See *Brinegar v. United States*, 338 U.S. 160 (1949), and *Carroll v. United States*, 267 U.S. 132, 162 (1925).

The possession of corporate or business records in and of themselves is not "illegal" and it is of little consequence with respect to probable cause whether an informant concluded that such items are to be found in a particular location. Cases involving tips as to the possession of such items as narcotics (*Aguilar v. State of Texas*, 378 U.S. 108, (1964)); marijuana (*United States v. Pruiett*, 540 F.2d 995 (9th Cir. 1976); *United States v. Damitz*, 495 F.2d 50 (9th Cir. 1974)); or illicit whiskey (*United States v. Harris*, 403 U.S. 573 (1971)) are distinguishable from the instant action in that the items themselves are contraband.

This Court in *Spinelli v. United States*, 393 U.S. 410, 413-414 (1969), in analyzing an affidavit to determine its adequacy, stated:

> "There can be no question that the last item mentioned, detailing the informant's tip, has a fundamental place in this warrant application. Without it, probable cause

> could not be established. The first two items reflect only innocent-seeming activity and date."

Where the sanctity of a home or office are intruded upon, there is a significant interference with Fourth Amendment rights and such an invasion of privacy cannot be based upon a lesser standard of reasonable suspicion that a crime has been committed. The courts have been guardians of the Fourth Amendment protections and have only permitted a requirement less than probable cause where there are appropriate circumstances of public interest. (In the area of border security, see *United States v. Brigoni-Ponce*, 422 U.S. 873 (1975); *United States v. Ortiz*, 422 U.S. 891 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). In the area of the public health and safety, see *Camera v. Municipal Court*, 387 U.S. 523 (1967)). No such appropriate circumstances of public interest exist in the instant action which would merit intrusions upon petitioner's constitutionally protected interests on anything less than probable cause to believe a federal crime has been committed. The government's suspicion that there may have been a crime of income tax evasion was insufficient to support the warrant for evidence of the crime.

It has been stated that probable cause "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime."

> "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes

> must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers whim or caprice."

Brinegar v. United States, 338 U.S. 161, 176 (1949); *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975); *Aguilar v. State of Texas, supra*, 318 U.S. at 121-122.

It is our belief that under the circumstances of this case, after the deletion of the unreliable portions of the affidavit, a magistrate could not reasonably conclude that the boxes and records moved and observed by Mr. Nestico were evidence of a crime. The balance between petitioner's right to liberty and the government's duty to control crime must therefore be struck in petitioner's favor.

We turn then to a specific discussion of the circumstances compelling disregard of the information provided by petitioner's wife.

As the district court below found, the informant was married to petitioner on August 24, 1952, separated in July or August, 1975 and divorced in 1977 (R.339). Patricia Sullivan, who was secretary of some of the corporations, began living with petitioner in September, 1975, thus prior to the time affiant received information from Helen Lefkowitz (*ibid.*).

In the affidavit, the agent related that the informant provided information that petitioner had withheld some records and fabricated others, and provided information pertaining to their location in petitioner's home and office. She also provided information which agent Laffer viewed as "corroborat[ing] from independent sources" and which he

"believe[d] establishes the reliability of said confidential source" (R.53).

The district court correctly concluded that the information relied upon as corroborative was not probative to the existence or whereabouts of records. Moreover, the information was not sufficiently corroborative when the identity of the informant was considered.

During the first hearing, on September 29, 1978, the district court concluded that the magistrate should have been informed of Mrs. Lefkowitz's identity and in any event disregarded the information provided by her as both unreliable and non-probative. In its final opinion, the court again recognized that the informant's identity should have been disclosed to the magistrate (R.348):

> "Although this court finds no constitutional or marital privilege in using a spouse/informant, this court agrees with defendant's first contention that the informant's identity should have been disclosed to the Magistrate because of the critical affect [sic] it would have had, under the circumstances of this case, in the determination of the informant's credibility. In this case, the confidential informant was not only present at the times during which corporate records were allegedly altered and concealed, but she was also the recently estranged wife of Lefkowtiz. Under these circumstances, the informant may have harbored an antagonistic state of mind, which was not ascertainable on the face of the affidavit, and such state of mind could have affected the reliability of her information. Revealing the informant's identity to the Magistrate would have appropriately allowed the Magistrate to consider these factors in determining the informant's credibility."

The district court nevertheless concluded that "because of the extensiveness of the corroboration, even with the

knowledge of the informant's identity, the Magistrate could still have found the informant credible and, therefore, the information provided properly usable." (R.349).

The Court of Appeals took a similar position and found that "could have" was sufficient to satisfy the Fourth Amendment. In our view, the vice of this reasoning is the reliance on the conclusion that the magistrate "*could* still have found the information credible." To attempt to calculate or predict the result the magistrate might have reached had he been properly informed, seriously denigrates Fourth Amendment rights.

Petitioner has argued throughout the proceedings below that Agent Laffer omitted a material fact in failing to disclose to the magistrate the identity and relationship of the informant. We also continually tendered a discrete ground for invaliding the warrant - that probable cause did not exist. Thus, the initial issue that must be determined is whether there are sufficient facts to sustain probable cause *now provided with the benefit of the knowledge that the informant was Helen Lefkowitz*. In our view, once the material omission, *i.e.*, the identity of the informant as Helen Lefkowitz, is placed into the affidavit, the affidavit becomes fatally defective. Where, as here, a material omission is involved, there is no necessity in the first instance to attempt to determine the difficult and elusive question as to whether the omission was caused intentionally with evil purpose, recklessly, or negligently. Plainly, for Fourth Amendment purposes, it is critical that a magistrate who issues the warrant receive a complete and fair understanding of the information known to the affiant. Where material information is omitted, the warrant procedure is tainted irrespective of the motivation of the affiant.

For constitutional purposes, the omission of material facts in a warrant application is a grave matter. The protection

of an individual's home from unreasonable search and seizure has always held a high position in our constitutional hierarchy. An omission of material fact effectively deprives the magistrate of the opportunity to perform the constitutional function—to determine probable cause.

The purpose, of course, for interposing the judgment of the magistrate is to provide a neutral arbiter. As recognized in the classic statement of Justice Jackson, writing for the Court in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.
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> * * *
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> When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

As the Ninth Circuit cogently observed in *United States v. Esparza*, 546 F.2d 841 (1976):

> "[A]n affidavit must present to the magistrate sufficient facts to allow him to independently determine whether probable cause to arrest exists.
>
> * * *

> Thus, the affidavit must inform the magistrate of all the essential facts with sufficient clarity to enable him to exercise his independent judgment. United States v. Anderson, 453 F.2d 174 (9th Cir. 1971). Half-truths and misrepresentations as well as conclusory allegations can reduce the function of a magistrate to that of a rubber stamp upon the law enforcement officer's personal determination of probable cause. [Citations omitted]."

Esparza thus teaches that a half-truth has great constitutional significance. Manifestly, the court's concern with a half-truth rests upon the unspoken or omitted portion, *i.e.*, the failure to reveal the *whole* truth. The protection to the citizenry afforded by " '[t]he warrant procedure operates on the assumption that statements in the affidavit of at least an accurate representation of what the affiant knows . . .' That *ex parte* process 'would quickly deteriorate into a meaningless formality were we to approve searches or arrests based upon misrepresentations or incorrect factual statements' *United States v. Morris*, 477 F.2d 657, 662 (5th Cir. 1973)." *United States v. Astroff*, 556 F.2d 1369 (5th Cir. 1977).

Similarly, in *United States v. Taxe*, 540 F.2d 961, 967 (1976), the Ninth Circuit considered on the merits appellant's claim that a law enforcement officer omitted material facts in the affidavit supporting a search warrant application. That court found the particular omissions were immaterial. See also *United States v. Hodge*, 539 F.2d 898, 904 (6th Cir. 1976).

There can be no serious challenge to the proposition that a material omission requires constitutional protection. Thus, for example, if a law enforcement officer, in seeking a

search warrant, failed to advise the magistrate that another person had confessed to the crime, there is no doubt that an omission has occurred which requires the court's intervention.

In our view, the line of authority dealing with prosecutorial material omissions in presenting evidence to grand juries is particularly instructive in guiding the Court's resolution of the issue presented here. Thus, in *United States v. Basurto*, 497 F.2d 781 (1974), the Ninth Circuit considered the effect of a prosecutor's failure to advise the grand jury that a witness later admitted that his testimony was in part, perjurious.

To vindicate the serious wrong, the *Basurto* court engaged in the extreme step of reversing an extant conviction and ordering the dismissal of the indictment. The court predicated its action on the supervisory power of the court, as well as the Due Process Clause of the Fifth Amendment. The court viewed its action as based "on a long line of cases which recognize the existence of a duty of good faith on the part of the prosecutor with respect to the court, the grand jury and the defendant." (*Supra*, at 786). See also *United States v. Gallo*, 394 F.Supp. 310 (D.Conn. 1975); *United States v. DeMarco*, 401 F.Supp. 505, 513-514 (C.D.Cal. 1975) affr'd on other grounds 550 F.2d 1224 (9th Cir. 1977); *Johnson v. Superior Court*, 15 Cal.3d 248, 124 Cal.Rptr. 32, 539 P.2d 792 (wherein the California Supreme Court affirmed the dismissal of an indictment where a state prosecutor failed to call the grand jury's attention to the defendant's testimony at a pre-indictment preliminary hearing which led the magistrate to dismiss the complaint). *Cf. Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1971); *United States v. Thomas*, 489 F.2d 664, 671 (5th Cir. 1973).

The failure to disclose the identity of the informant here is of critical importance. Here, any purported reliability to the information provided by the informant quickly vanishes once the informant's identity is revealed. The reliability disappears not only because of the potential bias of the informant, but also because the underlying circumstances used to corroborate the informant's information are totally lacking in probative value once it is revealed that the informant was the wife.

Unlike the situation that exists where there is an intentional, affirmative misstatement, here the credibility of the affiant is not at issue. In the instant case, the omission is a given fact. No factual issue is raised. All that remains is to determine the effect of the omission.

Here, in order to fairly evaluate the existence *vel non* of probable cause, it was crucial for the magistrate to have known the relationship between the informant and the owner of the premises to be searched.[3]

Moreover, the government is in serious error in its contention posed to the district court below that the court must apply the principle of *United States v. Ventresca*, 380 U.S. 102 (1965) and allow deference to the magistrate's determination of probable cause. While we do not quarrel with that proposition in an ordinary case the rule is plainly *in*-applicable where, as here, there has been a material omission in the information provided to the magistrate.

The magistrate's imprimatur for the warrant was thus given without the benefit of that crucial information. It would be a strange anomaly indeed if a law enforcement

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[3]This Court can surely take notice that where spouses are contemplating divorce, a spouse possesses a keen personal interest in having a thorough search by the IRS of the other's home and/or offices for papers, documents, etc. that could reveal undisclosed assets or any information that might be pertinent to the proceedings.

officer was permitted to withhold material information from the magistrate, then upon review by the district court benefited from a rule which indulges a presumption in favor of upholding the magistrate's discretion. Plainly, under the circumstances, without fault of the magistrate, the magistrate's act is not truly an act of informed discretion; thus no presumption upholding the magistrate's act should properly exist. This Court, however, is now required to assess the existence *vel non* of probable cause with the benefit of the facts not known to the magistrate. Thus, *de novo* consideration is a constitutional requisite.

The *raison d'etre* for the emergence of the rule allowing an attack on the truthfulness of an affidavit is manifest. The principle embodied in the Fourth Amendment warrant requirement is not that an affiant simply state facts constituting probable cause in a search warrant application, but rather that probable cause actually exists. The important protection safeguarded by the Fourth Amendment could soon vanish if a law enforcement officer was permitted to deceive the magistrate and benefit from such deception by the granting of the requested search warrant.

THE AFFIDAVIT FAILS TO STATE PROBABLE CAUSE UPON WHICH A WARRANT CAN PROPERLY ISSUE.

The benchmark case for resolution of the issue present here in *Spinelli v. United States*, 393 U.S. 410 (1969). Applying the stringent standards required by *Spinelli-Aguilar* (*v. Texas*, 378 U.S. 108 (1964)) to the present facts, it is plain that neither the informant's reliability nor the inherent reliability of the information is sufficiently established.

Thus, at the hearing in this matter on September 29, 1978, the district court below concluded (R.T.7):

> I think the affiant concedes, at least in my reading of the affidavit that Mrs. Lefkowitz is certainly not a tested reliable informant.
>
> For that reason, there are provisions that the Court has examined in reference to an attempt toward corroborating the untested informant.
>
> I certainly was not impressed by the corroboration. I think the corroboration naturally has to go, and I think that was brought out by one of the papers. Corroboration naturally has to go to the facts from which we establish probable cause. The questions regarding where she maintained the bank account and whether Mr. Laffer verified that and so forth, I don't find that to be the type of corroboration the cases are talking about.

The district court further concluded that it would disregard the information provided by Helen Lefkowitz. Nevertheless, at the hearing, the court concluded that the warrant would be validated since in the court's view, the information provided by Marc Nestico, standing alone, provided probable cause for the issuance of the warrant. In our view, the district court correctly determined that the corroboration was required for Nestico's information. The court, however, found the requisite corroboration from the statement of the apartment manager who observed Nestico moving boxes in October.

As petitioner has demonstrated previously, however, in fact the manager's observations do not at all corroborate Nestico. According to the affidavit, Nestico claimed that he was instructed to move the boxes in "the beginning of September, 1975" (Affidavit Page 5). Nestico said that he moved out of the apartment "in the end of October, 1975" (*id.*). It it thus plain that the manager simply observed Mr. Nestico moving his own items from the apartment in Oc-

tober, and no indicia of criminality or corroboration attaches to the manager's observations. Accordingly, the warrant must fail under *Spinelli-Aguilar*.

Moreover, our view is further corroborated by the fact that Nestico claimed that the boxes which he moved in early September were *three cardboard boxes and two portable files boxes* whereas the manager's observations in October were *six to eight cardboard boxes being moved*. It is, of course, a matter of common knowledge that when persons change residences, they ordinarily move personal items in cardboard boxes.

In addition, as petitioner has urges previously, Special Agent Laffer's investigation and conclusions do not support the issuance of the warrant. In addition to the grounds previously urged, we note that the conclusion that Laffer had "reviewed various records pertaining to the expenditures of Albert and Helen Lefkowitz for the years 1965 through 1971 and have found that their expenditures are not commensurate with the income reported in the above returns," (Affidavit, page 6, paragraph 12) "is a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision," *Spinelli, supra,* at 413. Certainly, in order to have any probative value, a magistrate should as a minimum be informed at least generally of the amount of alleged excess of expenditures.]

We add also that the fact that persons spend in excess of reported income is not highly probative of tax fraud. Many persons regularly spend from gifts, trusts, inheritance, loans, etc. Similarly, the informant Helen Lefkowitz's statements that personal expenses were paid with corporate funds is not sufficient indicia of criminality. It is certainly not uncommon to pay personal expenses with a corporate check and to properly charge the expense on the corporate records

to the individual on whose behalf the expense was paid. The United States Constitution simply requires far more specificity and indicia of criminality than occurred here.

Conclusion.

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A.

Opinion.

United States Court of Appeals for the Ninth Circuit, United States of America, Plaintiff-Appellee, v. Albert M. Lefkowitz, Defendant-Appellant. No. 79-1328 DC CR 78-758.

FILED: Jan. 31, 1980.

Appeal from the United States District Court for the Central District of California.

Before: DUNIWAY, CHOY and SCHROEDER, Circuit Judges. CHOY, Circuit Judge:

Lefkowitz appeals from his convictions for various tax fraud offenses. He challenges the validity of the search warrants issued to search his home and his corporate offices, focusing on the failure of the supporting affidavit to disclose the identity of the IRS's secret informant: his estranged wife Helen. This failure, he says, prevented the magistrate from exercising an informed, independent judgment in issuing the warrants and renders the affidavit insufficient to support a finding of probable cause. He further argues that the privilege against adverse spousal testimony or the confidential marital communications privilege prohibits the use of his wife as an informant. We affirm.

I. Statement of the Case.

Lefkowitz was convicted after a bench trial on stipulated facts of violating 18 U.S.C. §§ 371 and 1001 and U.S.C. §§ 7201, 7203 and 7206(1). He was sentenced to four years imprisonment and placed on three years probation to begin after his prison term.

Lefkowitz was the president of several related small corporations, most of them in the car rental/leasing business. On June 12, 1975, IRS agents went to the Lefkowitz cor-

porate offices, told Lefkowitz that he and his corporations were under investigation for possible violations of the tax laws and served him with a summons calling for the 1971-74 books and records of the Lefkowitz corporations to be produced at the IRS offices on June 23, 1975.

Sometime during the next week Lefkowitz, his lawyer Babic and his accountant Fisher met in Lefkowitz's private office to discuss the impending IRS document inspection.[1] In response to Lefkowitz's concern over large cash shortages evidenced by the 1973 books for N/U Rent-A-Car, one of the Lefkowitz entities, Fisher jokingly suggested burning the books. The less drastic solution of rewriting the books was chosen, and a secret, separate office was rented in which Fisher could perform his cosmetic accounting.

On June 23, the three conspirators met with agents at the IRS offices and Babic represented that the records called for in the summons did not exist or had been lost or destroyed. The date of July 14, 1975 was set for the production of whatever records could be found by then.

The next week Lefkowitz, with the help of his secretary Patricia Sullivan, Fisher, Mark Nestico (an employee) and Helen Lefkowitz, moved boxes of corporate records to Sullivan's apartment.. On July 14, the IRS agents were given the then-completed spurious 1973 N/U Rent-A-Car records.

On November 7 and 10, 1975, IRS agents received information from a confidential source (later revealed to be Helen Lefkowitz). She told the agents about the falsified books and about the removal of the original records to Sullivan's apartment, and added that some of the original records had been moved back into the corporate offices after

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[1]Babic was convicted of conspiracy and of aiding and assisting the presentation to the IRS of fraudulent documents. 18 U.S.C. § 371, 26 U.S.C. § 7206(2). We recently affirmed his convictions by memorandum in United States v. Babic, No. 79-1231 (9th Cir. Feb....., 1980).

July 14, when the false N/U Rent-A-Car documents had been produced. She had seen these records in the corporate offices as late as mid-October.

On November 17, an IRS agent interviewed Nestico, who admitted that on Lefkowitz's instructions he had helped move some boxes of records from the Sullivan apartment to Lefkowitz's residence, where he had seen them as late as the end of October. Nestico also saw records in the corporate offices at the end of October.

On the basis of an affidavit by IRS agent Laffer reciting this and other information, search warrants were issued on November 17 for the Lefkowitz corporate offices and Lefkowitz's residence. The affidavit did not reveal that the secret informant was Helen Lefkowitz. Much of the evidence used to convict Lefkowitz was obtained through the execution of these warrants.

II. The Nondisclosure That the Secret Informant Was Helen Lefkowitz.

A. The Facial Sufficiency of the Affidavit.

The threshold issue[2] is whether the affidavit provided the magistrate enough essential facts to enable her to exercise her independent judgment and perform her function as a "neutral and detached magistrate." *See United States v. Beusch*, 596 F.2d 871, 874 (9th Cir. 1979); *Aguilar v.*

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[2]The Government here renews its argument, unsuccessful below, that Lefkowitz lacks standing to challenge the search of his corporate offices. The Government correctly notes that Lefkowitz does not have standing merely because he was a corporate officer, United States v. Britt, 508 F.2d 1052, 1055-56 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975), and that mere presence at a search does not automatically impart standing, Rakas v. Illinois, 439 U.S. 128 (1978). Applying these rules, however, the court below nonetheless found that Lefkowitz had "a sufficient proprietary interest in the suite, which was the target of the search and where corporate records were seized, to impart standing." This finding is amply supported in the record.

Texas, 378 U.S. 108, 111 (1964), *quoting Johnson v. United States*, 333 U.S. 10, 14 (1948).

Aguilar announced a two-pronged test of the sufficiency of affidavits based on hearsay: first, the affidavit must provide information showing the reliability of the informant's information; second, the affidavit must provide information indicating the informant's credibility.

The affidavit here indicated that the informants had personally heard and observed that which they asserted. The first requirement, reliability, was therefore satisfied.

The affidavit here is replete with data indicating the informants' credibility: their information is firsthand, specific and highly detailed, thus it is "self-corroborating." *United States v. Banks*, 539 F.2d 14, 17 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976). Certain aspects of the information were independently corroborated by information already known to the IRS. *See United States v. Prueitt*, 540 F.2d 995, 1005 (9th Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977). The information was given to the IRS in circumstances subjecting the informants to possible personal or penal risk. *See United States v. Wood*, 550 F.2d 435, 438 (9th Cir. 1976). In addition, Helen Lefkowitz's and Nestico's stories corroborated each other.

The affidavit is clearly sufficient on its face to support a finding of probable cause. The information from the two hearsay sources satisfied both prongs of the *Aguilar* test.

B. The Challenge to the Affidavit.

Lefkowitz argues, however, that this court should look beyond the four corners of the affidavit and consider its sufficiency given Helen's identity and the accompanying credibility problems.

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court held that in order to challenge an affidavit valid

on its face, a defendant must show (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit purged of its falsities would not be sufficient to support a finding of probable cause.

Lefkowitz satisfies neither of these requirements.[3] He *asserts no intent or recklessness* in the *omission of Helen's identity* (in fact, Laffer swore that he offered the identity to the magistrate, who declined it). Moreover, even if the affiant had revealed Helen's identity, the affidavit still would have sufficed to support a finding of probable cause to issue search warrants.

True, Helen Lefkowitz was the estranged wife of the appellant and as such may have bad motivation to contact the IRS other than a sense of civic duty. After being married for 23 years, appellant and Helen Lefkowitz separated in August 1975. Appellant began living with Sullivan, his secretary, in September 1975. Helen Lefkowitz contacted the IRS in November 1975. The Lefkowitzes were eventually divorced in 1977. Inference of spite, vengeance, and perhaps a desire to obtain advantageous property settlement information via an IRS investigation might spring from this scenario. However, the district court expressly found that the magistrate *could have found Helen credible* even considering her identity, and thus the affidavit would support a finding of probable cause even if the omission was cured. This is not, therefore, a case like *United States v. Esparza*, 546 F.2d 841 (9th Cir. 1976), where the misinformation was crucial to the finding of probable cause; rather, it is more like *United States v. Taxe*, 540 F.2d 961, 967 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977), where

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[3]We assume, without deciding, that the *Franks* rationale also permits an attack on search warrants obtained by affidavits marred by *omissions* of facts required to prevent technically true statements in the affidavit from being misleading.

omissions from an affidavit were deemed immaterial. The district court's determination here was not clearly erroneous.

The nondisclosure of Helen Lefkowitz's identity does not require us to look beyond the four corners of the facially valid affidavit under the *Franks v. Delaware* test. Even considering her identity, she could still be found a credible informant.[4]

III. The Privilege Against Adverse Spousal Testimony and the Confidential Marital Communications Privilege.

Although Lefkowitz confuses these privileges, they are distinct.[5] *See United States v. Bolzer*, 556 F.2d 948, 951 (9th Cir. 1977). The first can be invoked to prevent one spouse from testifying against the other.[6] *E.g., Hawkins v. United States*, 358 U.S. 74 (1958). The second can be invoked to prevent the disclosure of confidential communications arising out of the marital relationship. *E.g., Blau v. United States*, 340 U.S. 332 (1951).

The privilege against adverse spousal testimony is of no use to Lefkowitz here because his wife did not "testify" against him, but provided information used to support the issuance of a search warrant. *See United States v. Mendoza*. 574 F.2d 1373, 1379 (5th Cir.) *cert denied*, 439 U.S. 988

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[4]Lefkowitz's argument that the affidavit fails to support a finding of probable cause that a federal offense had been committed is frivolous. Even if Helen's information were to be disregarded, the affidavit was replete with information from the IRS's own files and investigations which showed that tax offenses had been committed.

[5]The Federal Rule of Evidence with respect to privileges applies to proceedings for the issuance of search warrants. Fed.R. Evid. 1101(c), (d).

[6]This privilege is sometimes called the "antimartial facts" privilege. *E.G.*, United States v. Bolzer, 556 F.2d 948, 951 (9th Cir. 1977). This term is descriptively inaccurate and perhaps contributes to the confusion of the two privileges. We shall therefore refer to the first privilege as the privilege against adverse spousal testimony.

(1978) (introduction of co-conspirator wife's taped statement did not violate the privilege against adverse spousal testimony, "because Mrs. Mendoza did not testify at trial"). Moreover, this privilege does not preclude the use of a wife's statements against a defendant husband at trial when they are testified to by a third person. *United States v. Tsinnijinnie*, 601 F.2d 1035 (9th Cir. 1979). Here, Helen Lefkowitz did not personally appear before the magistrate; her information was recited in the affidavit of a third person. Therefore, the privilege did not bar this use of her statements.

The confidential marital communications privilege is also unavailable to Lefkowitz. It applies only to utterances or expressions intended to be communicative (*i.e.*, to convey a message from one spouse to the other) *and* confidential. *United States v. Lustig*, 555 F.2d 737, 748 (9th Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978).

The information Helen Lefkowitz provided to the IRS concerned the following facts: (1) the records turned over to the IRS were fraudulent; (2) the original records were removed from the corporate offices; (3) some of these records were moved to Sullivan's apartment; and (4) some of the original records were later moved back into the corporate offices (where they eventually were seized).[7]

Her information that the records given to the IRS were false and that some of the original records were moved back into the corporate offices and remained there was based on her personal observations. There was no communicative utterance or expression by her husband and therefore, her divulgence of this information did not violate the confiden-

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[7]Nestico, not Mrs. Lefkowitz, asserted that some of the records were to be found in the Lefkowitz residence. His information suffers from no infirmity. *See* note 8 *infra*, and accompanying text.

tial marital communications privilege. *See United States v. Bolzer*, 556 F.2d at 951.

The original records were removed from the corporate offices in the presence, and with the assistance, of Sullivan, Fisher and Nestico. Even assuming such actions were communicative, *see generally United States v. Lewis*, 433 F.2d 1146, 1150-51 (D.C. Cir. 1970), the presence of others destroys confidentiality and renders the privilege inapplicable. *See Pereira v. United States*, 347 U.S. 1, 6 (1954); *United States v. Lustig*, 555 F.2d at 748.

The only information based on a communication by Lefkowitz and arguably intended as confidential was that some records were moved to Sullivan's apartment. This piece of information can easily be disregarded without impairing the sufficiency of the affidavit. Nestico, the other informant relied on in the affidavit, provided essentially the same information, stating that he personally moved boxes of records, of a description strikingly similar to Mrs. Lefkowitz's description of the boxes of records she helped move, from Sullivan's apartment to the Lefkowitz residence.[8] The fact that these records were ever in the Sullivan apartment, moreover, was not essential, because that apartment was never searched. The nature of these records was sufficiently demonstrated to the magistrate by the fact that Lefkowitz had warned Nestico not to tell anyone about them. The affidavit

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[8]Because we reject *infra* Lefkowitz's argument that the marital privileges are somehow constitutionally grounded in, among other locations, the Fourth Amendment, we doubt that a secondary source of information obtained through information protected by the confidential marital communications privilege would in any way be "tainted." *See generally* Wong Sun. v. United States, 371 U.S. 471 (1963). Even assuming that some version of a "taint" theory were independently applicable to violations of this privilege, it is clear that in this case Nestico, the secondary source, was discovered by the IRS on the basis of statements by Helen Lefkowitz that were outside the protection of any marital privilege, *e.g.*, the statement that Nestico helped move boxes of records from the corporate offices.

was therefore sufficient even disregarding Helen Lefkowitz's and Nestico's information about the Sullivan apartment.

Thus, neither the privilege against adverse spousal testimony nor the confidential marital communications privilege precluded the use of any facts obtained from Helen Lefkowitz which were essential to the sufficiency of the affidavit.

Lefkowitz finally contends that these marital privileges are somehow grounded in various constitutional amendments and implement a constitutionally-protected right of marital privacy. These privileges, however, do not have constitutional underpinnings. *United States v. Doe*, 478 F.2d 194 (1st Cir. 1973).

IV. Conclusion.

The nondisclosure of Helen Lefkowitz's identity as the IRS's secret informant was not fatal to the affidavit. The privileges against adverse spousal testimony and of confidential marital communications do not preclude the use of any information essential to the sufficiency of the affidavit. Therefore, the search warrants were properly issued. AFFIRMED.